

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 155/MP/2012**

**Subject** Application under Section 79 of the Electricity Act, 2003 evolving a mechanism for Regulating including changing and/or revising tariff on account of frustration and/or of occurrence of force majeure (Article 12) and/or change in law (article 13) events under the PPAs due to change in circumstances for the allotment of domestic coal by GOI-CIL and enactment of new coal pricing Regulation by Indonesian Government.

**Coram** Dr. Pramod Deo, Chairperson  
Shri S.Jayaraman, Member  
Shri V.S.Verma, Member  
Shri M.Deena Dayalan, Member  
Shri A. S. Bakshi, Member (EO)

**Date of Hearing** 17.1.2013

**Petitioner** Adani Power Limited

**Respondents** Uttar Haryana Bijli Vitran Nigam Limited, Panchkula  
Dakshin Haryana Bijli Vitran Nigam Limited, Panchkula  
Gujarat Urja Vikas Nigam Limited, Vadodara

**Present:** Shri C S Vaidyanathan, Senior Advocate for the Petitioner  
Shri Amit Kapur, Advocate for the petitioner  
Shri Vikram Nankani, Advocate for the petitioner  
Shri Gautam Sahi, Advocate for the petitioner  
Shri Neil Hildreth, Advocate for the petitioner  
Shri Malav Deliwala, APL  
Shri Jatin Jalundhwala, APL  
Shri Vipul Jadav, APL  
Shri M.G Ramchandran, Advocate for Haryana and GUVNL  
Shri Nair, GUVNL

Ld. Senior Counsel for the Petitioner started his arguments by referring to the scheme of the Electricity Act, 2003 (the Act), National Electricity Policy, Tariff Policy and Competitive Bidding Guidelines regarding regulation of tariff by this Commission and submitted as under:

- (a) The petitioner and the respondents have entered into a contract and the underlying assumption in every contract that it should be commercially viable and workable. However, there is a contractual accident in this case since a contingency has arisen which neither party envisaged and which increased the cost of the project and made it commercially unviable.

- (b) The object of creating an independent regulator is to take into account the interest of all stakeholders including the generators and the procurers/consumers and therefore the regulator should evolve some mechanism to ensure that the generator is not made sick.
- (c) The objective of the Act is to generally take measures conducive to development of electricity industry as noticed from its preamble and therefore something which will destroy the industry should be avoided.
- (d) Under Section 61 of the Act, the Appropriate Commission is required to ensure that the generation, transmission, distribution and supply of electricity are conducted on commercial principles and while safeguarding of consumers' interest, recovery of the cost of electricity in a reasonable manner is to be ensured. Therefore the Appropriate Commission has to strike a balance between the interest of consumers and the interest of investors.
- (e) Under clauses (a) and (b) of sub-section (1) of Section 79 of the Act, the Central Commission is empowered to “regulate” the tariff of the generating companies, which power is wider than power of determination of tariff under Section 62 or adoption of tariff under Section 63 of the Electricity Act.
- (f) Section 63 of the Act, which starts with the *non obstante* clause, “Notwithstanding anything contained in section 62” overrides Section 62 only but does not override Sections 61 or 79 of the Act.
- (g) “Tariff Order” referred to in sub-section (6) of Section 64 of the Act is not limited to tariff determination under section 62 but also includes an order for adoption of tariff issued by the Appropriate Commission under section 63 of the Act.
- (h) The Central Commission as an independent regulator is to regulate the electricity industry in such a manner that it becomes competitive, ensures that electricity reaches the consumers in the areas where it has not been made available, making the companies viable so that the investments made should not become dead investments.
- (i) As seen from paras 2, 4, 5.5.1, 5.8.2 and 5.8.4 of the National Electricity Policy and pars 4 (b) and 5.3 (a) of the tariff policy, infrastructure sector needs huge investments. Private investments will not be attracted if a situation is created where the private sector with substantial investments is rendered completely sterile and is not able to recover whatever has been invested or is made to suffer losses.

- (j) The intention of the competitive bidding guidelines issued by Ministry of Power vide Notification dated 19.1.2005 is to introduce transparency and fairness in the procurement of power. The fairness in procurement process has not to be merely at the bidding stage but has to continue even thereafter.
- (k) Para 4.7 of the competitive bidding guidelines provides for adjustments on account of any change in law impacting cost or revenue from the business of selling electricity to the procurer.
- (l) Para 4.11 of the competitive bidding guidelines envisages adjustment of the energy charges payable during the operation of the contract on account of escalation. This para also takes note of some of the variables. Under this para, it has been clarified that the bidders have option to quote firm energy charge rates for each of the years of the contract. Therefore, the bidder may quote a firm price in which event they take into account the risk in regard to the variables mentioned. Notwithstanding the advanced knowledge, there are some variables which are not factored like change in law and policy by foreign government making cost much higher than what is envisaged and these variables cannot obviously be read as having been anticipated and comprehended when a firm energy charge is quoted.
- (m) Para 5.6 (vi) of the competitive bidding guidelines empowers the Central Commission to notify the escalation rates in respect of some of the variables, but the escalation as a result of change in foreign policy or law is not built into this para.
- (n) Under para 5.17 of the competitive bidding guidelines, any dispute relating to tariff or tariff related matters, are to be adjudicated by the Appropriate Commission. The provision made in para 5.17 is not qualified or restricted to only cases where there is escalable tariff, whether in regard to energy charges or capacity charges. This is broad and wide enough to cover all situations including where a firm rate is quoted. It is not possible to cut down width and scope of para 5.17 and say that it is only relevant only where there is no firm price bid. Para 5.17 will apply whether or not there is firm price bid.
- (o) Under the PPA signed with the Haryana utilities, "Appropriate Commission" is defined as the Central Commission or the Haryana State Commission as the case may be. In Gujarat PPA, the definition is different, only the State Commission is mentioned because at that stage there was no sale to Haryana but by the time it was decided to sell to Haryana also, the definition was changed.
- (p) Article 17 of the PPA describes the procedure for dispute resolution. In accordance with Article 17.3.1, provides for resolution of disputes relating to tariff by the Appropriate Commission, the governing law for which are the laws of India.

- (q) In response to a query by the Commission whether Article 17.1 covers only Indian law and whether 'governing law' is with regard to contract or dispute resolution, learned Sr. Counsel clarified that the governing law has been defined under Article 17.1 as laws of India for the purpose of resolution of disputes to distinguish from the definition of 'law' which includes all laws. Learned Sr. Counsel also clarified that the petitioner is not enforcing the law of force majeure of Indonesia but is seeking to enforce Indian Law for the force majeure event due to promulgation of Indonesian Regulations.
- (r) The performance of obligations under the PPAs is excused on occurrence of any *force majeure* event, as defined under Article 12.3 of the PPAs. The increase in price of Indonesian Coal is a *force majeure* event.
- (s) "Change in Law" as defined under Article 13.1.1 of the PPA, includes change in foreign law as well since the expression used is "any Law". The applicant had given notice of promulgation of Indonesian Regulation under "change in Law" provision to GUVNL in July 2011 and to the Haryana Utilities in May 2012.
- (t) In view of Sections 32 and 56 of the Contract Act, 1876, PPAs are not enforceable and have become void as it has become impossible to supply power to the respondents at the agreed rates on account of increase in price of Indonesian Coal.
- (u) In response to a query by the Commission as to whether the performance of PPAs has become impossible or onerous on account of promulgation of Indonesian Regulation, Learned Sr. Counsel submitted that the Hon'ble Supreme Court has construed "impossibility" as including the physical impossibility as well as the commercial impossibility. The underlying assumption is that the generator will make profit to ensure timely payment of loans and if the generator makes losses, it became commercially impracticable to discharge the obligations under the PPA.
- (v) Section 63 of the Act cannot be oblivious of Section 61 thereof. Therefore, the underlying principle of Section 63 is that the tariff payable by the consumer/procurer should be on cost-plus basis and the seller supplies electricity to the procurers at a rate that it does not suffer any loss.
- (w) The present case is a contractual accident, which was not visualized under the PPA. However, the PPA has to be interpreted on the basis of commercial practicability. The Central Commission may declare the PPA as void or may allow escalation in tariff.
- (x) In response to the query of the Commission that in a contract for 25 years, the bidder is expected to anticipate and factor in all risks, learned Sr. Counsel clarified that while making the bids, the bidders have factored in the risks in the non-escalable component to the extent anticipated and the

bids cannot be said to include the risks which could not have been reasonably anticipated at the time of submission of bids.

- (y) The applicant is suffering loss of ₹ 790 crore every year for supply of power to Gujarat and ₹ 580 crore for supply to Haryana and the loss will be a recurring loss over a period of 25 years.
- (z) In reply to a query of the Commission whether the petitioner was suffering any loss in recovery of fixed charges, learned Sr. Counsel clarified that change in Indonesian law had not affected the fixed charges and only the energy charges are affected. In response to another query by the Commission, it was informed that in the Fuel Supply Agreement signed by the applicant there are no built-in safeguards. When the Commission asked for the rates for supply of coal, the Commission's attention was drawn to para 32 of the petition according to which at the time of submission of bids, price of Indonesian coal was USD 36 per MT, which had increased to USD 90 to USD 102 per MT for coal of 5200 Cal GCV and the applicant had factored the price USD 42 per MT. It was clarified that when the PPAs were executed, the petitioner expected that 70% of the fuel requirement would be met from domestic coal and the remaining 30% by imported coal. However, presently 58% of the fuel requirement is to be met through Indonesian coal and 42% through domestic coal.
- (aa) The attention of the Commission was drawn to bid documents and the communication dated 6.11.2007 received from Ministry of Coal regarding allocation of domestic coal which was the basis for the submission of bids. It was informed that the agreement for supply of Indonesian coal was for a period of five years. The applicant had filed a copy of MOU signed with Kowa Company Ltd for supply of coal from Japan while submitting the bid to GUVNL.
- (bb) The Commission observed that from the documents on record it appeared that on the date of submission of bids, the petitioner had not finalized the price of coal.
- (cc) The Commission observed that the applicant should show on the basis of documentary evidence the manner in which the applicant is affected by the promulgation of Indonesian Regulation. An undertaking was given to meet the observation of the Commission.

2. The Commission directed the applicant to place on record the following under affidavit:

- (a) All documents relating to fuel supply, including the Fuel Supply Agreement executed with Adani Enterprises Ltd and the agreement executed by Adani

Enterprises Ltd with the original supplier of Indonesian coal. The source of imported coal being Indonesia should be justified on the basis of Fuel Supply Agreements.

- (b) The safeguards built into the fuel supply contract against escalation of price.
- (c) Price of imported coal agreed or considered in the contracts at the time of bidding and market price of Indonesian imported coal at that time alongwith coal quality parameters.
- (d) Exact impact of Indonesian Regulation on different aspects of price of coal such as royalty, non-tax revenue on the seller and buyer as per agreement.
- (e) The prices of coal in the international market at the time of bidding and present international price.
- (f) Copies of coal supply agreements dropped/scrapped.

3. The Commission further directed GUVNL and Haryana Utilities to submit on affidavit the details of the documents submitted by the Petitioner at the time of bidding and post bidding relating to fuel source of the project.

4. The above documents/information shall be filed under affidavit by 31.1.2013.

5. The Commission directed to list the petition for hearing on 6.2.2013.

By order of the Commission

Sd/-  
T. Rout  
Joint Chief (Law)